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PREVENTIVE DETENTION: LIBERTY IN THE BALANCE

I. INTRODUCTION

The Bail Reform Act of 1984¹ effected a radical change in federal bail jurisprudence.² From the enactment of the first Judiciary Act in 1789 until October 12, 1984, the date on which the Bail Reform Act took effect,³ it was generally true that federal defendants in noncapital cases could be admitted to bail.⁴ Under the new law, the government may detain federal defendants prior to trial solely on the ground that they represent a danger to the community.⁵

Barely more than a decade ago, the constitutionality of such a measure was a matter of serious dispute.⁶ But a number of recent decisions provide a legal framework for the argument that preventive detention is constitutional. In *Bell v. Wolfish*⁷ the United States Supreme Court distinguished conditions of pretrial detention that are merely regulatory, and hence constitutional, from those that are punitive, and hence unconstitutional.⁸ In *United States v. Edwards*⁹ the District of Columbia Court of Appeals rejected eighth amendment¹⁰ and due process challenges to a statute that authorized preventive detention.¹¹ In *Schall v. Martin*¹² the Supreme Court upheld

1. Pub. L. No. 98-473, Title II, ch. 1, 98 Stat. 1976 (1984) (codified at 18 U.S.C. §§ 3141-3150 and scattered other sections of Titles 18 and 28 U.S.C. (Supp. III 1985)).

2. *United States v. Melendez-Carrion*, 790 F.2d 984, 1009 (2d Cir. 1986) (Feinberg, C.J., concurring); *United States v. Accetturo*, 783 F.2d 382, 392 (3d Cir. 1986) (Sloviter, J., dissenting).

3. Abramovsky & Chikofsky, *Second Circuit's Hard Look at Preventive Detention*, N.Y.L.J., May 27, 1986, at 1, col. 3, at 5, col. 1.

4. *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *United States v. Edwards*, 430 A.2d 1321, 1326 n.6 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982). See Judiciary Act of 1789, § 33, 1 Stat. 73, 91 (1789); Bail Reform Act of 1966, Pub. L. No. 89-465, § 3146(a), 80 Stat. 214 (1966).

5. 18 U.S.C. § 3142(e) (1982 & Supp. III 1985).

6. Compare, e.g., Ervin, *Foreword: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 291 (1971) (arguing that preventive detention is unconstitutional); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970) (same) with Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L. J. 1382 (1972) (arguing that preventive detention is constitutional); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969) (same).

7. 441 U.S. 520 (1979).

8. *Id.* at 535-39. The Court expressly avoided the issue of the constitutionality of preventive detention. *Id.* at 534 n.15.

9. 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

10. U.S. CONST. amend. VIII ("Excessive bail shall not be required . . .").

11. 430 A.2d at 1325-41. Congress had enacted the statute, D.C. CODE ANN. § 23-

New York's scheme for preventive detention of juvenile offenders.¹³ In finding the new Act constitutional, many federal courts have also drawn an analogy to decisions that have upheld civil commitment of persons who are dangerous and either insane or mentally incompetent.¹⁴

This comment will analyze the Bail Reform Act of 1984. It will examine whether the recent detention cases were decided correctly and whether they do in fact support the constitutionality of preventive detention.

The great majority of courts, including the United States Courts of Appeals for the First, Third, Seventh, and Eleventh Circuits, have concluded that the Bail Reform Act is, at least, not unconstitutional on its face.¹⁵ But even some of these courts have cautioned that one of the Act's most troublesome features—the possibility of indefinite pretrial detention¹⁶—may in some circumstances render it unconstitutional as applied.¹⁷

1322 (1973), in 1970 in connection with the Nixon administration's "law and order" campaign. See *Mitchell*, *supra* note 6.

12. 467 U.S. 253 (1984).

13. *Id.* at 256-57. Both *Schall* and *Edwards* relied in part on *Wolfish*. 467 U.S. at 269-71; 430 A.2d at 1331-33.

14. See, e.g., *United States v. Zannino*, 798 F.2d 544, 548-49 (1st Cir. 1986); *United States v. Perry*, 788 F.2d 100, 112-13 (3d Cir.), *cert. denied*, 107 S. Ct. 218 (1986); *United States v. Hazzard*, 598 F. Supp. 1442, 1450 (N.D. Ill. 1984). The cases on which these courts have relied include *Jones v. United States*, 463 U.S. 354 (1983); *Addington v. Texas*, 441 U.S. 418 (1979); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Greenwood v. United States*, 350 U.S. 366 (1956); and *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). See *infra* notes 160-162 and accompanying text.

15. *United States v. Rodriguez*, 803 F.2d 1102, 1103 (11th Cir. 1986); *Zannino*, 798 F.2d at 546-47; *Perry*, 788 F.2d at 109-18; *United States v. Portes*, 786 F.2d 758, 766-68 (7th Cir. 1985); *United States v. Accetturo*, 783 F.2d 382, 387-88 (3d Cir. 1985); *United States v. Simmons*, 643 F. Supp. 290, 292-93 (S.D. Fla. 1986); *United States v. Knight*, 636 F. Supp. 1462, 1469 n.6 (S.D. Fla. 1986); *United States v. Freitas*, 602 F. Supp. 1283, 1286-93 (N.D. Cal. 1985); *United States v. Kouyoumdjian*, 601 F. Supp. 1506, 1511 (C.D. Cal. 1985); *United States v. Acevedo-Ramos*, 600 F. Supp. 501, 505-07 (D.P.R. 1984), *aff'd*, 755 F.2d 203 (1st Cir. 1985); *Hazzard*, 598 F. Supp. at 1448-53.

16. See *infra* text accompanying notes 65-78.

17. *Zannino*, 798 F.2d at 546-49; *United States v. Salerno*, 794 F.2d 64, 78-79 (2d Cir.) (Feinberg, C.J., dissenting), *cert. granted*, 107 S. Ct. 397 (1986); *United States v. Melendez-Carrion*, 790 F.2d 984, 1007-09 (2d Cir. 1986) (Feinberg, C.J., concurring); *Portes*, 786 F.2d at 768; *Accetturo*, 783 F.2d at 388; *Knight*, 636 F. Supp. at 1469 n.6; *United States v. LoFranco*, 620 F. Supp. 1324, 1325-26 (N.D.N.Y. 1985), *stay denied*, 620 F. Supp. 1327, *appeal dismissed sub nom. United States v. Cheeseman*, 783 F.2d 38 (2d Cir. 1986); *Hazzard*, 598 F. Supp. at 1451 n.5; *cf. United States v. Gonzales Claudio*, 806 F.2d 334, 343 (2d Cir. 1986) (detention for more than 14 months on the ground of probability of flight would violate due process); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) (detention for more than five months on the ground of probability of flight would violate due process). But *cf. United States v. Berrios-Berrios*, 791 F.2d

The Second Circuit alone has found the Act facially unconstitutional.¹⁸ That court spoke first through a divided panel in *United States v. Melendez-Carrion*.¹⁹ In that case, the defendants, a band of Puerto Rican nationalists known as *Los Macheteros*,²⁰ had been in detention for over eight months.²¹ Because of the large number of defendants and the broad scope of pretrial discovery, the defendants would not have faced trial for two to three years.²²

In his opinion for the court, Judge Newman eloquently declared that pretrial detention based on a prediction of future criminality violated the substantive guarantee of liberty embodied in the due process clause of the fifth amendment.²³ Chief Judge Feinberg did not agree that preventive detention was inherently unconstitutional.²⁴ Nonetheless, he found that on the facts of *Melendez-Carrion* detention had degenerated into punishment and had, therefore, become unconstitutional.²⁵ In dissent, Judge Timbers contended that preventive detention, even of indefinite duration, was a valid con-

246, 252-53 (2d Cir.) (detention for more than eight months on the ground of probability of flight did not violate due process), *cert. dismissed*, 107 S. Ct. 562 (1986).

18. *United States v. Romano*, 799 F.2d 17, 18 (2d Cir. 1986); *United States v. Frisone*, 795 F.2d 1, 2 (2d Cir. 1986); *Salerno*, 794 F.2d at 71-75; *Melendez-Carrion*, 790 F.2d at 1000-04; *id.* at 1007-09 (Feinberg, C.J., concurring); *LoFranco*, 620 F. Supp. at 1325-26.

19. 790 F.2d 984 (2d Cir. 1986). In *United States v. Colombo*, 777 F.2d 96, 100-01 (2d Cir. 1985), the Second Circuit had initially dodged the constitutional question.

20. In English "*Los Macheteros*" means "The Machete Wielders." 790 F.2d at 989.

21. *Id.* at 1006 (Feinberg, C.J., concurring). The defendants were held on charges arising out of the September 12, 1983, robbery of a Wells Fargo office in West Hartford, Connecticut. *Id.* at 988 (opinion of the court).

22. *See id.* at 1006 (Feinberg, C.J., concurring).

23. *Id.* at 1000-04 (opinion of Newman, J.).

24. *Id.* at 1005-07 (Feinberg, C.J., concurring). Relying on *Wolfish* and *Schall*, Chief Judge Feinberg concluded that preventive detention served constitutional regulatory ends. With the passage of time, however, detention could degenerate into punishment. *Id.* at 1007-09. For other authorities that support this proposition, see *supra* note 17.

25. 790 F.2d at 1007-09. The Second Circuit's order did not immediately result in freedom for the *Melendez-Carrion* defendants. First, the order applied only to the two defendants—Gonzales Claudio and Camacho-Negron—who were being held solely on the grounds of dangerousness; the other seven defendants, who were being held on the ground of risk of flight and, in several cases, dangerousness as well, gained nothing. *Id.* at 1005 (opinion of Newman, J.). In addition, on remand the district judge revised his prior findings and ordered Gonzales Claudio and Camacho-Negron detained on a new ground: risk of flight. *United States v. Gonzales Claudio*, 806 F.2d 334, 336 (2d Cir. 1986). The Supreme Court refused to intercede. *Melendez-Carrion v. United States*, 107 S. Ct. 18 (1986). Finally, in November 1986, the Second Circuit ordered the release of Gonzales Claudio and Camacho-Negron, holding that pretrial detention for 15 months on the ground of risk of flight violated due process. *Gonzales Claudio*, 806 F.2d at 343; *cf. Theron*, 782 F.2d at 1516 (detention for more than five months on the ground of probability of flight would violate due process). On December 3, 1986, the district judge set bail not only for Gonzales Claudio and Camacho-Negron, but also for their

gressional response to the problem of violent crimes committed by persons released on bail.²⁶

In *United States v. Salerno*²⁷ the Second Circuit clarified its position on preventive detention by adopting the view of Judge Newman: such a restriction, on its face, denies substantive due process.²⁸ Salerno's situation was not as compelling as that of the *Melendez-Carrion* defendants, since he had been in detention for a mere three months.²⁹ Thus, Chief Judge Feinberg, applying his duration test from *Melendez-Carrion*, maintained that the detention had not yet lost its regulatory character.³⁰ But the majority held that preventive detention of any duration is unconstitutional.³¹ The Supreme Court has agreed to hear the *Salerno* appeal,³² and may

seven codefendants. *Bail Is Ordered for Nine "Terrorists,"* Nat'l L.J., Dec. 22, 1986, at 14, col. 1.

26. 790 F.2d at 1011-15 (Timbers, J., dissenting). Judge Timbers characterized preventive detention as a purely regulatory and, therefore, constitutional measure. See *id.*

27. 794 F.2d 64 (2d Cir.), cert. granted, 107 S. Ct. 397 (1986).

28. *Id.* at 71-75. Although Judge Newman was also a member of the *Salerno* majority, Judge Kearse authored the opinion of the court. That opinion, however, incorporates by reference much of the reasoning of Judge Newman's opinion in *Melendez-Carrion*. See *Salerno*, 794 F.2d at 72-74. Thus, the validity of the result in *Salerno* is largely dependent on the validity of the conclusions expressed in the lead opinion in *Melendez-Carrion*.

29. *Id.* at 79 (Feinberg, C.J., dissenting). The *Salerno* case thus forced the court to decide whether preventive detention was unconstitutional per se, or whether it would become unconstitutional only if the passage of time caused it to lose its regulatory character.

30. *Id.*

31. *Id.* at 71.

32. 107 S. Ct. 387 (1986). Note, however, that on November 19, 1986, in the so-called Mafia Commission trial, a federal jury in Manhattan convicted Salerno and seven codefendants on numerous counts of extortion and racketeering. *Eight Crime Bosses Convicted*, Wash. Post, Nov. 20, 1986, at A3, col. 1. The *Salerno* case, therefore, now seems moot: the government had contended only that the Constitution did not require Salerno's release prior to his conviction. Still, the Court might seek to entertain the case under the exception to the mootness doctrine for controversies "capable of repetition, but evading review." See *Roe v. Wade*, 410 U.S. 113, 125 (1973) and authorities cited therein. However, the Bail Reform Act authorized indefinite pretrial detention; therefore, many controversies will endure sufficiently long to permit Supreme Court review. Consider, for example, that the *Melendez-Carrion* defendants spent 15 months in detention before a federal district judge ordered their release. *Bail Is Ordered for Nine "Terrorists,"* Nat'l L.J., Dec. 22, 1986, at 14, col. 1.

Nevertheless, because of the strength of the government's case, the Court may be reluctant to relinquish the opportunity to decide *Salerno*. In *Salerno*, for example, the Court need not confront the difficult issue of the constitutionality of indefinite pretrial detention, the defendants' having been detained a mere three months; Salerno himself, the longtime don of one of the nation's leading crime families, is clearly the sort of "dangerous" defendant against whom Congress expected the Act to apply; and, finally, the conviction, by ratifying the pretrial finding of dangerousness, may militate indirectly in favor of reversal.

soon determine the constitutionality of the Bail Reform Act.³³

II. HISTORY

Before the Bail Reform Act became law, judicial officers setting bail could not legitimately consider predictions of future criminality. Federal defendants would be admitted to bail except in three circumstances: (1) they were charged with a capital offense;³⁴ (2) they were exceedingly likely to flee;³⁵ or (3) they had threatened witnesses or jurors.³⁶

The first two exceptions were closely related. Capital defendants were not refused bail on the ground that, if released, they were likely to endanger the safety of the community.³⁷ Historically, many offenses that carried the death penalty were not dangerous to the community at large.³⁸ The majority of courts and commentators have suggested that capital defendants were simply thought more likely than ordinary defendants to flee in order to avoid prosecution.³⁹ As one court stated: "In a choice between hazarding his life before a jury and forfeiting his or his sureties' property, the framers of the Constitution obviously reacted to man's undoubted urge to

33. See Lauter, *How Sharp to the Right Might the Court Veer*, Nat'l L.J., Oct. 6, 1986, at 10, col. 2; Thompson, *Showdown on Preventive Detention*, Daily Record (Baltimore, Md.), Aug. 21, 1986, at 1, col. 2; Murphy, *Law Allowing Denial of Bail Provokes Debate on Rights*, The Wash. Post, Aug. 1, 1986, at A1, col. 5, at A12, col. 6.

34. *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *United States v. Edwards*, 430 A.2d 1321, 1326 n.6 (D.C. 1981); Bail Reform Act of 1966, Pub. L. No. 89-465, § 3146(a), 80 Stat. 214 (1966); Judiciary Act of 1789, § 33, 1 Stat. 73, 91 (1789).

35. See *United States v. Melendez-Carrion*, 790 F.2d 984, 1002 (2d Cir. 1986) and authorities cited therein; *United States v. Abrahams*, 527 F.2d 3, 5 (1st Cir.), *cert. denied*, 439 U.S. 821 (1978).

36. See *Carbo v. United States*, 82 S. Ct. 662, 667-68 (Douglas, Circuit Justice 1962) (denial of bail pending appeal); *Fernandez v. United States*, 81 S. Ct. 642, 643-44 (Harlan, Circuit Justice 1961) (denial of bail during trial); *United States v. Payden*, 768 F.2d 487, 488 (2d Cir. 1985) (denial of bail prior to trial); *United States v. Wind*, 527 F.2d 672, 675 (6th Cir. 1975) (denial of bail prior to trial); *United States v. Gilbert*, 425 F.2d 490, 491-92 (D.C. Cir. 1969) (denial of bail during trial).

37. Tribe, *supra* note 6, at 377. But cf. Mitchell, *supra* note 6, at 1225 (concluding that "anticipated danger to other persons or the community was a substantial motivating factor in legislative decisions to make bail unavailable to certain classes of dangerous offenders").

38. For example, forgery, sodomy, and horse theft historically carried the death penalty. While these types of crimes might pose some danger to the immediate victim, they do not threaten the physical safety of a large portion of society. See *Melendez-Carrion*, 790 F.2d at 997-98 and authorities cited therein; Tribe, *supra* note 6, at 377-78.

39. In essence, the capital defendant exception was a corollary of the second exception: capital defendants were deemed per se likely to flee.

prefer the latter.”⁴⁰

The underlying justifications for withholding bail—prevention of flight and protection of witnesses and jurors—do not serve to protect the safety of the general community. Rather, their purpose is to preserve the integrity of the judicial process.⁴¹ The use of bail to secure a defendant's presence at trial merely enables society to bring malefactors to justice.⁴² Withholding bail in order to protect witnesses and jurors does protect certain members of the community from physical danger. The protection afforded the community, though, is philosophical rather than physical: it ensures that the trial society demands will be a fair one.⁴³

Only after conviction, when a defendant sought freedom pending appeal, did courts ever examine whether the defendant's release might pose a threat to the safety of the community.⁴⁴ But some cautioned against considering dangerousness even in this circumstance. For example, Justice Black wrote:

The idea that it would be “dangerous” in general to allow the applicant to be at large must—if it is ever a justifiable ground for denying bail as distinguished from a separate proceeding for a bond to keep the peace—relate to some kind of danger that so jeopardizes the public that the only way to protect against it would be to keep the applicant in jail.⁴⁵

Similarly, Justice Jackson, writing for the Second Circuit Court of Appeals, stated: “Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique. . . .”⁴⁶

40. *State v. Konigsberg*, 33 N.J. 367, 373, 164 A.2d 740, 743 (1960) (citing *State v. Williams*, 30 N.J. 105, 125, 152 A.2d 9, 19 (1959)).

41. *Melendez-Carrion*, 790 F.2d at 1002.

42. *Id.*; Tribe, *supra* note 6, at 397.

43. *Melendez-Carrion*, 790 F.2d at 1002.

44. See *Carbo v. United States*, 82 S. Ct. 662, 666 & n.4 (Douglas, Circuit Justice 1962) and authorities cited therein; *Russell v. United States*, 402 F.2d 185, 187 (D.C. Cir. 1968).

45. *Sellers v. United States*, 89 S. Ct. 36, 38 (1968) (Black, Circuit Justice). For a discussion of Justice Black's alternative remedy, the peace bond, see Tribe, *supra* note 6, at 394 n.94, 402 & n.137.

46. *Williamson v. United States*, 184 F.2d 280, 282-83 (Jackson, Circuit Justice 1950). It is remarkable that both the *Sellers* and the *Williamson* decisions came at moments of grave national crisis. *Sellers*, a black militant opposed to the Vietnam War, had been convicted of “refusing to submit to induction into the armed services.” 89 S. Ct. at

Some critics contend that judges have always considered dangerousness, without admitting as much. They claim that judges, when confronted with a particularly violent defendant, would set excessively high bail on the pretense that the defendant was unlikely to appear at trial.⁴⁷ Yet even if this claim were true, the law ought not to be changed in order to legitimize past misdeeds.⁴⁸

III. THE ACT

Section 3142(e) of the Bail Reform Act⁴⁹ expressly empowers the judiciary to deny bail on the basis of predictions of future criminality:

If . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.⁵⁰

Section 3142(g) instructs judges and magistrates in the art of evaluating threats to community safety. The judicial officer should consider, among other factors: "the nature and circumstances of the offense charged";⁵¹ "the weight of the evidence against the person";⁵² indicia of the defendant's past, such as ties to the community, employment record, and history of drug or alcohol abuse; and whether the government brought the current charges while the defendant was on bail, probation, or parole.⁵³ The subsection includes the seemingly tautological instruction to consider "the nature and seriousness of the danger to any person or the commu-

38. The *Williamson* defendants, writers for the Communist Party newspaper *The Daily Worker*, had been convicted of Smith Act violations arising out of their opposition to the Korean War. 184 F.2d at 283.

47. S. REP. NO. 225, 98th Cong., 1st Sess. 10-11, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3193; 130 CONG. REC. S946 (daily ed. Feb. 3, 1984) (remarks of Sen. Hatch); see *Melendez-Carrion*, 790 F.2d at 1012 (Timbers, J., dissenting).

48. It appears that Congress intended the Act to permit greater access to bail by deterring judges from setting high money bonds. See S. REP. NO. 225, 98th Cong., 1st Sess. 9, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3191-92; see also 18 U.S.C. § 3142(c) (Supp. III 1985) (judicial officer may not impose a financial condition that results in a person's pretrial detention). That attempt, however, appears to have failed: a preliminary report from the General Accounting Office suggests that many defendants are still unable to make bail. Murphy, *Law Allowing Denial of Bail Provokes Debate on Rights*, *The Wash. Post*, Aug. 1, 1986, at A1, col. 5, at A12, col. 5.

49. 18 U.S.C. § 3142(e) (Supp. III 1985).

50. *Id.*

51. *Id.* at § 3142(g)(1).

52. *Id.* at § 3142(g)(2).

53. See *id.* at § 3142(g)(3)(A)-(B).

nity that would be posed by the person's release."⁵⁴

The Act also establishes two rebuttable presumptions of dangerousness. One presumption arises if a judge or magistrate finds probable cause to believe that the defendant either has committed an offense under the federal narcotics laws that is punishable by at least ten years imprisonment,⁵⁵ or has used or unlawfully carried a firearm during the commission of a crime of violence.⁵⁶

Sections 3142(e) and 3142(f) together set forth the complex formula for a second presumption. Briefly stated, defendants are rebuttably presumed dangerous if: they have been convicted, within the last five years, of a crime of violence, an offense punishable by life imprisonment or death, or a major drug offense; they are currently before the court on similar charges; and they are alleged to have committed the offenses with which they are presently charged while on release pending trial.⁵⁷

Section 3142(e) provides that a hearing must take place prior to detention.⁵⁸ Section 3142(f) establishes the procedure for these "detention hearings."⁵⁹ Defendants have the right to counsel, to testify on their own behalf, to call and to cross-examine witnesses, and to place other evidence in the record.⁶⁰ Hearsay evidence is admissible at the hearing.⁶¹

These statutory safeguards are adequate, if not elaborate; every court that has considered this issue has held that the Act affords procedural due process.⁶² In fact, in *Schall v. Martin*⁶³ the Supreme

54. *Id.* at § 3142(g)(4).

55. *Id.* at § 3142(e). See Controlled Substances Act, Pub. L. No. 91-513, Title II, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801-02 and scattered other sections of Titles 18, 21, & 42 U.S.C. (1982 & Supp. III 1985)); Controlled Substances Import and Export Act, Pub. L. No. 91-513, Title III, 84 Stat. 1285 (1970) (codified as amended at 21 U.S.C. §§ 951-66 and scattered other sections and titles of the United States Code (1982 & Supp. III 1985)). In *United States v. Romano*, 799 F.2d 17 (2d Cir. 1986) (per curiam), the court held that this presumption violated substantive due process. *Id.* at 18.

56. 18 U.S.C. § 3142(e). See *id.* at § 924(c) (Supp. III 1985).

57. See 18 U.S.C. § 3142 (e)-(f) (Supp. III 1985).

58. *Id.* at § 3142(e).

59. *Id.* at § 3142(f).

60. *Id.*

61. *Id.* Some courts and commentators have found the admissibility of hearsay to be particularly troubling. See, e.g., *United States v. Accetturo*, 783 F.2d 382, 395 (3d Cir. 1985) (Sloviter, J. dissenting); Ervin, *supra* note 6, at 298. For example, prosecutors can preclude the right to cross-examination if they present the affidavits of government witnesses, rather than the witnesses themselves. *Accetturo*, 783 F.2d at 395 (Sloviter, J., dissenting).

62. See, e.g., *United States v. Perry*, 788 F.2d 100, 113-16 (3d Cir. 1986); *United States v. Portes*, 786 F.2d 758, 768 (7th Cir. 1985); *United States v. Freitas*, 602 F. Supp.

Court upheld a New York statute that authorized preventive detention of juveniles, although the statute's procedural safeguards were substantially fewer than those of the Bail Reform Act.⁶⁴

Perhaps the most unique, and most troublesome, feature of the Act is its failure to specify any upper limit for the period of detention.⁶⁵ The statute that the District of Columbia Court of Appeals found constitutional in *United States v. Edwards*⁶⁶ specified that detention could last no longer than sixty days.⁶⁷ Similarly, New York's statutory scheme for preventive detention of juveniles, which the Supreme Court upheld in *Schall*, authorized at most seventeen days in detention.⁶⁸ If a criminal defendant is held interminably, the "detention" takes on the appearance of a de facto jail sentence.

Congress intended that the Speedy Trial Act⁶⁹ would limit the length of pretrial detention.⁷⁰ Section 3164 of the Speedy Trial Act states that pretrial detainees must come to trial within ninety days after detention begins.⁷¹ Unfortunately, the "days" to which that section refers are not calendar days. Section 3161(h) contains numerous provisions for "excludable time" that does not count against the ninety-day requirement.⁷²

1283, 1291-93 (N.D. Cal. 1985); *United States v. Hazzard*, 598 F. Supp. 1442, 1452 (N.D. Ill. 1984); cf. *United States v. Edwards*, 430 A.2d 1321, 1333-41 (D.C. 1981) (upholding the constitutionality of analogous procedures under the District of Columbia's preventive detention statute). Notwithstanding Justice Rehnquist's insistence in *Schall v. Martin*, 467 U.S. 253, 278-79 (1984), that dangerousness is judicially discernible, other indications suggest that the courts have met with serious difficulties in making such determinations. Riley, *Preventive Detention Use Grows—But Is It Fair?*, Nat'l L.J., Mar. 24, 1986, at 1, col. 1, at 33, cols. 1-2.

63. 467 U.S. 253 (1984).

64. *See id.* at 274-80. For an excellent description of the inadequacy of the procedures at issue in *Schall*, *see id.* at 283-86, 303-06 (Marshall, J., dissenting). Note, however, that the liberty interest of juveniles is not as strong as that of adults. Under the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), therefore, the government may use less elaborate procedures in effecting preventive detention of juveniles. *See* 467 U.S. at 275-81.

65. 18 U.S.C. § 3142(e) (Supp. III 1985). This feature has evoked expressions of concern from nearly every court that has considered the Act. *See infra* note 78 and authorities cited therein.

66. 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

67. *Id.* at 1323; D.C. CODE ANN. § 23-1322(d)(2)(a) (1981). For some crimes, the maximum period of detention under the District of Columbia statute is now 90 days. D.C. CODE ANN. § 23-1322(d)(4) (1981 & Supp. 1986).

68. *See* 467 U.S. at 270; N.Y. JUD. LAW §§ 320.5, 340.1 (McKinney 1983).

69. 18 U.S.C. §§ 3161-74, 3152-56 (1982 & Supp. III 1985).

70. *See* 130 CONG. REC. S941 (daily ed. Feb. 3, 1984) (statements of Sen. Specter); *id.* (statements of Sen. Thurmond); *id.* at S943 (statements of Sen. Laxalt).

71. 18 U.S.C. § 3164(a)-(b) (1982 & Supp. III 1985).

72. *See id.* at § 3161(h).

A trial judge may grant excludable time if, *inter alia*, the defendant undergoes physical or mental examinations, pursues an interlocutory appeal, or faces trial in the interim on other charges.⁷³ The potential for delay is greatest, however, in complex cases, especially those involving numerous defendants. In such cases, in order to serve "the ends of justice,"⁷⁴ the trial judge is often compelled to grant a continuance to one or both of the parties.⁷⁵ These continuances do not count against the Speedy Trial Act's ninety-day time limit.⁷⁶ Yet the period of excludable delay may last for months, or even years.⁷⁷ As a result, nearly every court that has considered the constitutionality of the Bail Reform Act has held that, at least in some cases, the time limits of the Speedy Trial Act may not adequately protect due process interests.⁷⁸

73. See generally *id.* In *United States v. Colombo*, 616 F. Supp. 780 (E.D.N.Y. 1985), *rev'd*, 777 F.2d 96 (2d Cir. 1986), the trial court judge observed that, in addition to the nine major grounds for excludable time set forth in § 3161(h), the court's standard form for ordering excludable delay listed 30 reasons plus numerous additional subreasons. 616 F. Supp. at 786.

74. 18 U.S.C. § 3164(h)(2)(8)(A) (1982 & Supp. III 1985).

75. See, e.g., *United States v. Melendez-Carrion*, 790 F.2d 984, 1006 (2d Cir. 1986) (Feinberg, C.J., concurring); *Colombo*, 616 F. Supp. at 786-87.

76. 18 U.S.C. § 3164(h) (1982 & Supp. III 1985).

77. See, e.g., *Melendez-Carrion*, 790 F.2d at 1006 (Feinberg, C.J., concurring) (two to three years might pass before completion of defendants' trials); *Colombo*, 616 F.2d at 785 (13 months to two years might pass before completion of defendants' trials).

78. See, e.g., *United States v. Zannino*, 798 F.2d 544, 547-48 (1st Cir. 1986); *Melendez-Carrion*, 790 F.2d at 1007-09 (Feinberg, C.J., concurring); *United States v. Portes*, 786 F.2d 758, 768 (7th Cir. 1985); *United States v. Accetturo*, 783 F.2d 383, 388 (3d Cir. 1986); *United States v. Colombo*, 777 F.2d 96, 100-01 (2d Cir. 1985); *United States v. Knight*, 636 F. Supp. 1462, 1469 n.6 (S.D. Fla. 1986); *United States v. LoFranco*, 620 F. Supp. 1324, 1325-26 (N.D.N.Y. 1985), *appeal dismissed sub nom.* *United States v. Cheeseman*, 783 F.2d 38 (2d Cir. 1986); *United States v. Hazzard*, 598 F. Supp. 1442, 1451 n.6 (N.D. Ill. 1984); *cf.* *United States v. Gonzales Claudio*, 806 F.2d 334, 343 (2d Cir. 1986) (detention of more than 14 months on ground of probability of flight would violate due process); *United States v. Berrios-Berrios*, 791 F.2d 246, 251-53 (2d Cir. 1986) (continued detention for over eight months on ground of probability of flight might eventually give rise to due process concerns); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) (detention for more than five months on the ground of probability of flight would violate due process). But see *Melendez-Carrion*, 790 F.2d at 1014 (Timbers, J., dissenting); *United States v. Freitas*, 602 F. Supp. 1283, 1291 (N.D. Cal. 1985) (time limits of Speedy Trial Act adequately protect detainees' due process rights); *United States v. Kouyoumdjian*, 601 F. Supp. 1506, 1511 (C.D. Cal. 1985) (time limits of Speedy Trial Act are "sufficient to ensure that the defendant's due process rights are compromised to the least extent practicable"); *United States v. Acevedo-Ramos*, 600 F. Supp. 501, 505 (D.P.R. 1984), *aff'd*, 755 F.2d 203 (1st Cir. 1985) (time limits of Speedy Trial Act eliminate due process concerns).

IV. CONSTITUTIONAL ANALYSIS

Three cases shape the analysis of the Bail Reform Act's constitutionality: *Bell v. Wolfish*,⁷⁹ *United States v. Edwards*,⁸⁰ and *Schall v. Martin*.⁸¹ *Wolfish* and *Edwards*, which were both decided before the Senate Judiciary Committee drafted the Act, figured prominently in the congressional debate over the Act's constitutionality.⁸² *Schall*, which the Supreme Court decided after the bill had been drafted but before it became law, directly confronts the issue of preventive detention, albeit in the context of juvenile offenders.⁸³

A. *Bell v. Wolfish*

In *Bell v. Wolfish*⁸⁴ the United States Supreme Court considered the constitutionality of certain draconian conditions of pretrial detention,⁸⁵ not the constitutional preconditions for detention itself.⁸⁶ In a startling passage, however, Justice Rehnquist, writing for the majority, purported to abolish the presumption of innocence, except insofar as it pertains to criminal trial procedure:

The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. It is "an inaccurate, shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; . . . ' an 'assumption' that is indulged in the absence of contrary evidence." Without question, the presumption of innocence plays an important role in our criminal justice

79. 441 U.S. 520 (1979).

80. 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

81. 467 U.S. 253 (1984).

82. See S. REP. NO. 225, 98th Cong., 1st Sess. 8, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3190-91.

83. 467 U.S. at 264-80.

84. 441 U.S. 520 (1979).

85. The Court upheld, *inter alia*, body cavity searches that were conducted after every occasion on which detainees had physical contact with visitors. *Id.* at 558-62.

86. See *id.* at 523-24. Technically, therefore, *Wolfish* does not bear directly on the issue of preventive detention. *Schall v. Martin*, 467 U.S. 253, 289 (1984) (Marshall, J., dissenting); *United States v. Melendez-Carrion*, 790 F.2d 984, 1001 n.4 (2d Cir. 1986). In fact, the Court in *Wolfish* expressly declined to pass on the constitutionality of preventive detention. 441 U.S. at 534 n.15.

system. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.⁸⁷

This passage has clear implications for the debate over the constitutionality of preventive detention. If it is incorrect to speak of criminal defendants as "presumptively innocent," except perhaps in describing the allocation of the burden of proof at trial, then preventive detention might easily come to resemble a form of civil commitment, rather than incarceration.⁸⁸

The language of the Bail Reform Act demonstrates Congress' awareness of this aspect of *Wolfish*. Section 3142(j) states that nothing in the Act should be construed "as modifying or limiting the presumption of innocence."⁸⁹ In the debates over the Act, however, several Senators expressed concern that persons who were "presumptively innocent" might nonetheless be compelled to endure lengthy periods of pretrial detention.⁹⁰ The presumption of innocence, therefore, may yet provide guidance. Indeed, closer analysis

87. *Wolfish*, 441 U.S. at 533 (citations omitted) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 484 n.12 (1978), and *Coffin v. United States*, 156 U.S. 432, 453 (1895), respectively). This was not dicta: both the trial court and the court of appeals had relied on the presumption of innocence as the source of a constitutional right to be free of certain burdensome conditions of confinement. *Id.* at 532. The Court's attempt to limit the presumption in this way, however, flies in the face of statements to the contrary in several Supreme Court cases. See *id.* at 582-83 n.10 and authorities cited therein (Stevens, J., dissenting).

Nonetheless, in cases construing the Bail Reform Act, many courts have agreed that *Wolfish* thus limits the presumption of innocence. See, e.g., *United States v. Cocco*, 604 F. Supp. 1060, 1061 (M.D. Pa. 1985); *United States v. Acevedo-Ramos*, 600 F. Supp. 501, 507 (D.P.R. 1984), *aff'd*, 755 F.2d 203 (1st Cir. 1985); *United States v. Hazzard*, 598 F. Supp. 1442, 1449-50 (N.D. Ill. 1984). But see *United States v. Accetturo*, 783 F.2d 382, 396 (3d Cir. 1986) (Sloviter, J., dissenting); *United States v. Deitz*, 629 F. Supp. 655, 656 (N.D.N.Y. 1986) (detainees presumed innocent until they admit guilt); cf. *Schall v. Martin*, 467 U.S. 253, 291 (1984) (Marshall, J., dissenting) (state statute authorizing pretrial detention of juveniles conflicted with the presumption of innocence).

88. In fact, at least one court has attempted to characterize preventive detention as a form of civil, rather than criminal, detention. *United States v. Perry*, 788 U.S. 100, 109 (3d Cir.), *cert. denied*, 107 S. Ct. 218 (1986).

89. 18 U.S.C. § 3142(j) (Supp. III 1985); see S. REP. NO. 225, 98th Cong., 1st Sess. 25, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3208.

90. 130 CONG. REC. S939, S944 (daily ed. Feb. 3, 1984) (statements of Sen. Mitchell); *id.* at S940 (statements of Sen. Specter). These remarks concerned an unsuccessful attempt to reduce the period of pretrial detention under the Speedy Trial Act from 90 days to 60 days.

of *Wolfish* suggests that the Court transformed, rather than obliterated, the presumption.

The Court distinguished between "punitive" and "regulatory" conditions of confinement, holding that a detainee has a constitutional right to be free of punishment prior to an adjudication of guilt.⁹¹ The source of this right was clearly the substantive guarantee of liberty embodied in the due process clause of the fifth amendment. In its conclusion, the Court referred to each of the landmark decisions in which it has held that constitutional liberty encompasses rights beyond those enumerated in positive sources of law such as statutes, regulations, or the Constitution itself.⁹²

This new constitutional right, however, proved illusory, for the Court ignored language in its prior decisions in order to adopt a restrictive definition of "punishment."⁹³ Justice Rehnquist initially quoted *Kennedy v. Mendoza-Martinez*,⁹⁴ the case in which the Court attempted to elaborate a constitutional definition of that term. The *Mendoza-Martinez* Court stated that, absent evidence of express legislative intent to punish,⁹⁵ the following factors would be significant:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.⁹⁶

91. 441 U.S. at 535-36.

92. *Id.* at 580 (Stevens, J., dissenting). As authority for the newly discovered right, the Court cited *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The majority denied that it had identified a new, fundamental right, asserting that "we leave prior decisional law as we find it." *Wolfish*, 441 U.S. at 535 n.17. Does it follow from this assertion that, under "prior decisional law," substantive due process did not form the basis of the right to be free of punishment prior to an adjudication of guilt? No. Instead, from the Court's assertion it follows only that, whatever its source, this right predates the *Wolfish* decision.

93. *See* 441 U.S. at 538-39.

94. 372 U.S. 144 (1963).

95. For an example of express legislative intent to punish, see *United States v. Lovett*, 328 U.S. 303, 308-12 (1946).

96. 372 U.S. at 168-69 (footnotes omitted).

Despite the clear statement that the factors above "are all relevant," Justice Rehnquist immediately discarded every aspect of *Mendoza-Martinez* except the "rational connection" factor—the easiest of all to satisfy. He then proceeded to apply that factor alone as if it were the entire test.⁹⁷ The "alternative purpose" of institutional security was "rationally assignable" to practices such as body cavity inspections. Those practices did not, therefore, constitute punishment prior to an adjudication of guilt.⁹⁸ Rather, the Court regarded them as mere "regulatory restraints," which detainees were obliged to suffer as an incident of detention.⁹⁹

Three dissenting justices condemned Justice Rehnquist's disingenuous reasoning. They recognized that the Court had, in effect, employed a rational basis test to assess the alleged denial of a fundamental right.¹⁰⁰ Such an approach thoroughly devalues the constitutional safeguards for the detainees' liberty interests. "For," as Justice Stevens stated, "governmental activity that affects even minor interests and is 'arbitrary and purposeless' is unconstitutional whether or not it is punishment."¹⁰¹

An honest application of the *Mendoza-Martinez* test demonstrates that preventive detention does in fact constitute punishment. Pretrial detention clearly involves an affirmative restraint on personal liberty.¹⁰² This is particularly so in light of the *Wolfish* Court's

97. 441 U.S. at 538-39. In a footnote, the Court conceded that exceedingly harsh conditions of detention might still constitute punishment even if the conditions were rationally related to a legitimate governmental objective. *Id.* at 539-40 n.20. Thus, at least one additional element of *Mendoza-Martinez* survived *Wolfish*. In fact, in practice the lower courts have proceeded as though the entire *Mendoza-Martinez* test remains good law. See, e.g., *United States v. Edwards*, 430 A.2d 1321, 1332 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

98. 441 U.S. at 561-62. Employing this standard, the Court also upheld, *inter alia*, the practice of housing two detainees in a cell designed for one; a rule that permitted detainees to receive books or magazines only if a publisher or book club mailed the materials directly to the institution; and a rule that permitted detainees to receive food or personal property only at Christmas. See *id.* at 539-60.

99. See *id.* at 537.

100. *Id.* at 563-64 (Marshall, J., dissenting); *id.* at 588, 589 (Stevens, J., dissenting).

101. *Id.* at 584-85 n.15 (Stevens, J., dissenting). Note also that the *Wolfish* majority placed on the detainees the "heavy burden" of demonstrating that the challenged conditions of detention were neither "rationally related to a legitimate governmental purpose" nor "excessive in relation to that purpose." *Id.* at 561-62. Because *Wolfish* turned on the alleged denial of a fundamental constitutional right, however, it was plainly incorrect for the majority to allocate the burden in that manner. Instead, the Court should have required the United States to demonstrate that a compelling governmental interest justified the challenged conditions. See *Edwards*, 430 A.2d at 1369 (Mack, J., dissenting) and authorities cited therein.

102. *United States v. Melendez-Carrion*, 790 F.2d 984, 1008 (2d Cir. 1986) (Feinberg, C.J., concurring); *Edwards*, 430 A.2d at 1369 (Mack, J., dissenting).

essentially *laissez faire* attitude toward restrictive conditions of institutional confinement.¹⁰³ The Court's approval of body cavity searches, even when executed upon the slightest suspicion, symbolizes the limitations on liberty and privacy that a detainee must endure.

Preventive detention also serves two of the traditional aims of punishment—deterrence and incapacitation. The threat of an indefinite period of detention prior to trial might reasonably constitute a deterrent to crime.¹⁰⁴ Moreover, although the Court in *Mendoza-Martinez* did not include incapacitation in its brief list of “the traditional aims of punishment,” it has since held that prevention of future crimes is an aspect of punishment:

It would be archaic to limit the definition of “punishment” to “retribution.” Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.¹⁰⁵

In addition, incapacitation is technically a species of deterrence; when incapacitated, one cannot commit a crime.¹⁰⁶ Hence, it may be argued that *Mendoza-Martinez* did in fact recognize incapacitation as a traditional aim of punishment.¹⁰⁷

Other considerations suggest that preventive detention constitutes punishment prior to an adjudication of guilt. Under the Bail Reform Act, the government may detain a defendant only upon a showing of *scienter*—that is, only if there is clear and convincing evidence of the defendant's propensity to commit violent, criminal acts in the future.¹⁰⁸ Furthermore, detention itself, as well as its purposes, has “historically been regarded as punishment.”¹⁰⁹

103. See 441 U.S. at 562.

104. Indeed, it is remarkable that advocates of preventive detention seem not to advance this point.

105. *United States v. Brown*, 381 U.S. 437, 458 (1965), partly quoted in *Melendez-Carrion*, 790 F.2d at 999.

106. Incapacitation is referred to as “specific” as opposed to “general” deterrence. *Edwards*, 430 A.2d at 1333 & n.30. It is really the best form of deterrence.

107. The *Edwards* court, however, rejected this argument. *Id.* at 1333.

108. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *United States v. Salerno*, 794 F.2d 64, 77 (2d Cir.) (Feinberg, C.J., dissenting), cert. granted, 107 S. Ct. 397 (1986); see 18 U.S.C. § 3142(e) (Supp. III 1985).

109. *Mendoza-Martinez*, 372 U.S. at 168; see *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896); *Ex parte Wilson*, 114 U.S. 417, 426-29 (1885); *Campbell v. McGruder*, 580 F.2d 521, 530 (D.C. Cir. 1978) (“the conditions of pretrial imprisonment are virtually indistinguishable from those of punishment”); cf. *Stack v. Boyle*, 342 U.S. 1, 4

The Supreme Court, in *Mendoza-Martinez*, contemplated that many of the factors it enumerated would point in different directions.¹¹⁰ Yet, in the context of the Bail Reform Act, those factors point almost uniformly toward a characterization of preventive detention as punishment.

B. *United States v. Edwards*

In *United States v. Edwards*¹¹¹ the District of Columbia Court of Appeals considered and rejected numerous constitutional challenges to preventive detention.¹¹² In particular, the *Edwards* court thoroughly and forcefully rejected the claim that the eighth amendment establishes an absolute right to bail in all noncapital cases.¹¹³ Despite substantial scholarly support for the position that the constitution does confer such a right,¹¹⁴ every court that has considered an eighth amendment challenge to the Bail Reform Act has followed *Edwards*.¹¹⁵

The bail clause of the eighth amendment does not state that the right to bail is absolute; instead it forbids only "excessive bail."¹¹⁶ Yet one might argue that the absolute power to withhold bail is tantamount to the power to set bail so excessively high that no person could buy his or her freedom.¹¹⁷ The Supreme Court has never passed directly on this issue, but in two cases decided during the October 1951 Term, the Court confused the matter by issuing conflicting dicta.

In *Stack v. Boyle*¹¹⁸ the Court wrote that:

(1951) ("This traditional right to freedom before conviction . . . serves to prevent the infliction of punishment prior to conviction.").

110. *Mendoza-Martinez*, 372 U.S. at 169.

111. 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

112. The court thus upheld the statute that served as a prototype for the Bail Reform Act.

113. 430 A.2d at 1325-41.

114. See, e.g., Ervin, *supra* note 6, at 298; Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 970-71 (1965); Tribe, *supra* note 6, at 398-406. But see Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 86-90 (1977); Meyer, *supra* note 6, at 1179-94; Mitchell, *supra* note 6, at 1224-25.

115. See, e.g., *United States v. Melendez-Carrion*, 790 F.2d 984, 996-98 (2d Cir.), *cert. dismissed*, 107 S. Ct. 562 (1986); *United States v. Freitas*, 602 F. Supp. 1283, 1287 (N.D. Cal. 1985); *United States v. Kouyoumdjian*, 601 F. Supp. 1506, 1511 (C.D. Cal. 1985); *United States v. Acevedo-Ramos*, 600 F. Supp. 501, 506-07 (D.P.R. 1984), *aff'd*, 755 F.2d 203 (1st Cir. 1985).

116. U.S. CONST. amend. VIII ("Excessive bail shall not be required . . .").

117. *Melendez-Carrion*, 790 F.2d at 996-97. But even the most liberal court, the Second Circuit, has rejected this contention. See *id.*

118. 342 U.S. 1 (1951).

This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.¹¹⁹

But only four months later, in *Carlson v. Landon*,¹²⁰ the Court observed that:

The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to confer a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail.¹²¹

Favoring *Stack* over *Carlson*, a handful of courts had held that the eighth amendment does confer an absolute right to bail.¹²² The *Edwards* court, however, used the historical insight in *Carlson* as a point of departure.¹²³

The court contended that the Framers were familiar with documents which, by their literal terms, established an absolute right to bail. Yet, instead of using those documents, they lifted the bail clause directly from the English Bill of Rights.¹²⁴ The history of bail

119. *Id.* at 4 (citation omitted). This statement is dicta, because the Court held simply that lower courts had set excessive bail for defendants charged with violations of the Smith Act. *Id.* at 7.

120. 342 U.S. 524 (1952).

121. *Id.* at 545. This statement is dicta as well. In *Carlson*, the Court merely upheld Congress' ability to withhold bail prior to civil deportation proceedings for alien communists. *Id.* at 544-46.

122. See, e.g., *Escandar v. Ferguson*, 441 F. Supp. 53, 58 (S.D. Fla. 1977); *Trimble v. Stone*, 187 F. Supp. 483, 484-85 (D.D.C. 1960); see also *United States v. Motlow*, 10 F.2d 657, 659 (Butler, Circuit Justice 1926) (decided before *Stack*, but also holding that eighth amendment confers an absolute right to bail); *United States v. Fah Chung*, 132 F. 109, 110 (S.D. Ga. 1904) (dictum to the effect that criminal defendants possess a right to be admitted to bail in all cases).

123. The court also relied substantially on the scholarship of Professors Duker and Meyer. See *supra* notes 6 & 114.

124. 430 A.2d at 1327-29. These documents included the Northwest Ordinance, which was reenacted by the same Congress that adopted the Bill of Rights. *Id.* at 1329.

The court correctly rejected the implausible argument that the importation of the English bail clause was an historical error. See Foote, *supra* note 114, at 984-87. Professor Foote maintained that George Mason, the lay draftsman of the eighth amendment, failed to comprehend the limited legal effect of the English bail clause, but that the Framers, nonetheless, intended the American bail clause to bind Congress. *Id.* This is engaging historical speculation. As the *Edwards* court observed, however, the legislative record concerning the bail clause contains but one sentence—and that sentence merely comments upon the ambiguity of the word "excessive." 1 ANNALS OF CONG. 754 (J. Gales ed. 1789) (statements of Rep. Livermore); see Tribe, *supra* note 6, at 398. The

in England should, therefore, clarify the meaning of the American bail clause.¹²⁵ Parliament seems to have enacted the bail clause of the English Bill of Rights only in response to abuses by the Crown and the judiciary.¹²⁶ Thus, the court concluded, the bail clause of the eighth amendment simply prohibits the courts from abusing their power by setting "excessive bail"; it does not restrict Congress' discretion to define the conditions on which a defendant is entitled to bail.¹²⁷

In its historical analysis, the *Edwards* court failed to adequately address the crucial distinction between the British parliamentary system and the American constitutional system. Unlike Parliament, Congress possesses only limited powers.¹²⁸ Thus, the existence of an unlimited power in Congress to define the scope of the people's civil liberties is thoroughly inconsistent with the underlying theme of the Bill of Rights. As Justice Black remarked:

The Eighth Amendment is in the American Bill of Rights

evidence, therefore, does not conclusively demonstrate either that the Framers intended or that they did not intend the American bail clause to limit Congress' ability to withhold bail. See 430 A.2d at 1329. Furthermore, George Mason's contributions notwithstanding, many attorneys were among the persons who considered, debated, and approved the Bill of Rights.

125. See 430 A.2d at 1326-29.

126. *Id.* at 1327.

127. *Id.* at 1327-28. The vast majority of courts seem to have held that, at the very least, the eighth amendment requires that bail not be denied unreasonably. See, e.g., *Carlson v. Landon*, 342 U.S. 524, 569 (1952) (Burton, J., dissenting); *Hunt v. Roth*, 648 F.2d 1148, 1164-65 (8th Cir. 1981), *vacated as moot sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982) (per curiam); *United States v. Beaman*, 631 F.2d 85, 86 (6th Cir. 1980); *Finetti v. Harris*, 609 F.2d 594, 599 (2d Cir. 1979); *United States v. Abrahams*, 575 F.2d 3, 5 & n.2 (1st Cir.), *cert. denied*, 439 U.S. 821 (1978); *United States ex rel. Goodman v. Kehl*, 456 F.2d 863, 868 (2d Cir. 1972); *United States ex rel. Covington v. Coparo*, 297 F. Supp. 203, 205-06 (S.D.N.Y. 1969); *United States ex rel. Fink v. Heyd*, 287 F. Supp. 716, 717-18 (E.D. La. 1968), *aff'd*, 408 F.2d 7 (5th Cir.), *cert. denied*, 396 U.S. 895 (1969); *cf. United States v. Melendez-Carrion*, 790 F.2d 984, 997 (2d Cir. 1986) (the eighth amendment limits the breadth of Congress' authority to restrict the availability of bail); *Atkins v. Michigan*, 644 F.2d 543, 549 (6th Cir.), *cert. denied*, 452 U.S. 964 (1981) (due process prohibits arbitrary denial of bail).

Given the legitimacy of Congress' findings concerning crimes committed by persons released on bail, see S. REP. NO. 225, 98th Cong. 1st Sess. 6 & n.14, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3188-89, the Bail Reform Act would probably pass such a rational basis test. Thus, the debate over the Act's constitutionality seems reducible to the claim that the right to bail is fundamental. See *United States v. Perry*, 788 F.2d 100, 112 (3d Cir.), *cert. denied*, 107 S. Ct. 218 (1986) (eighth amendment claim amounts to an assertion that the Act deprives defendants of liberty without due process of law); *Edwards*, 430 A.2d at 1331 (right to bail, although important, is not fundamental).

128. 430 A.2d at 1367 (Mack, J., dissenting); Tribe, *supra* note 6, at 400. In response to this distinction, the *Edwards* majority simply reiterated its conclusion that the Framers intended the bail clause only to bind the judiciary. 430 A.2d at 1330.

of 1789, not the English Bill of Rights of 1689. And it is well known that our Bill of Rights was written and adopted to guarantee Americans greater freedom than had been enjoyed by their ancestors who had been driven from Europe by persecution.¹²⁹

Moreover, if Congress' power to define the conditions of bail were indeed absolute, the bail clause might become surplusage, as Congress could then conceivably withhold bail in every criminal case.¹³⁰ The constitutional bar against "excessive" bail, therefore, clearly contemplates that, at least in some cases, Congress does not possess an unlimited power to withhold bail.

C. *Schall v. Martin*

In *Schall v. Martin*¹³¹ the Supreme Court flatly upheld the constitutionality of preventive detention, although only in the juvenile context.¹³² Relying in part on *Wolfish*,¹³³ the Court held that a New York juvenile bail statute violated neither procedural nor substantive due process.¹³⁴

Writing for the majority, Justice Rehnquist refined the approach he had first announced in *Wolfish*. A restraint on liberty such as preventive detention is regulatory rather than punitive only if it serves a "legitimate and compelling" state purpose.¹³⁵ The Court decided that crime prevention was such a purpose.¹³⁶ But Rehnquist imposed two additional conditions: (1) the governmental purpose must be "rationally assignable" to the restrictions imposed; and (2) the restrictions must not be excessive in relation to the governmental purpose.¹³⁷

129. *Carlson* 342 U.S. at 557 (Black, J., dissenting).

130. 430 A.2d at 1365 (Mack, J., dissenting). Congress might, however, achieve substantially the same result without entirely abolishing the statutory right to bail. By withholding bail in all but minor criminal cases, Congress could render the bail clause a virtual nullity. Cf. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953) (questioning whether Congress, in the exercise of its article III power to regulate the jurisdiction of the Supreme Court, might "except" from the Court's jurisdiction all but patent cases).

131. 467 U.S. 253 (1984).

132. *Id.* at 281.

133. 441 U.S. 520 (1979). See *supra* Section IV.A.

134. 467 U.S. at 256-57.

135. *Id.* at 264-68.

136. *Id.*

137. *Id.* This second tier is clearly the reincarnation of *Wolfish*. The flawed rational basis test is embellished only slightly by Justice Rehnquist's assent to an additional inquiry into the excessiveness of the challenged restrictions. See *supra* notes 96-99 and accompanying text.

The Court applied these standards to the New York juvenile bail law. It is important to note that in relation to each step in the Court's analysis, the Bail Reform Act is distinguishable from the New York statute. Thus, *Schall* will not be controlling precedent when the Court considers the *Salerno* appeal.¹³⁸ The *Schall* Court relied heavily on the state's interest in protecting wayward children from the consequences of their own misconduct.¹³⁹ "The State," the Court remarked, "has a *parens patriae* interest in preserving and promoting the welfare of the child, ' . . . which makes a juvenile proceeding fundamentally different from an adult criminal trial.' "¹⁴⁰ The state interest at stake in *Schall*, therefore, was not simply crime prevention.

In addition, the Court recognized that, because of the state's *parens patriae* power, a juvenile's liberty interest is less significant than that of an adult.¹⁴¹ The liberty interest of the child, while "undoubtedly substantial, . . . must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody."¹⁴² Thus, *Schall* does not support preventive detention of *adult* offenders. The Supreme Court has yet to hold, or even to suggest, that the government's "legitimate and compelling" interest in crime prevention outweighs the liberty interests of competent adults.

The Court in *Schall* next considered whether preventive detention under the New York statute served a regulatory, rather than punitive, purpose. Justice Rehnquist found it persuasive that every state in the union and the District of Columbia had adopted legisla-

138. *But see* United States v. Accetturo, 783 F.2d 382, 394 (Sloviter, J., dissenting) (observing that the Court is unlikely to make such a distinction).

139. 467 U.S. at 263-66. The Court largely deferred to the prior conclusions of the New York Court of Appeals. Upholding the statute against an earlier challenge, the state court had emphasized " 'the desirability of protecting the juvenile from his own folly.' " 467 U.S. at 265 (quoting *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 688-89, 385 N.Y.S.2d 518, 521, 350 N.E.2d 906, 909 (1976)). The Court of Appeals had also recognized that, because of their immaturity, juveniles are less capable of self-restraint than adults; hence, " 'there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult charged with crime will do so.' " 467 U.S. at 265-66 n.15 (quoting *Wayburn*, 39 N.Y.2d at 687-88, 385 N.Y.S.2d at 520-21, 350 N.E.2d at 908-09).

140. 467 U.S. at 263 (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)). The Court's recognition that juvenile proceedings are "fundamentally different" from adult trials ought to be sufficient in itself to limit *Schall*'s precedential effect in the area of preventive detention of adult defendants.

141. *Id.* at 265. The Court concluded that a "juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's '*parens patriae*' interest in preserving and promoting the welfare of the child." *Id.* (quoting *Santosky*, 455 U.S. at 766).

142. *Id.*

tion that authorized preventive detention of juveniles,¹⁴³ and each state court that had considered the constitutionality of these statutes had found them valid.¹⁴⁴ Because of the uniform legislative and judicial approval of this practice, the Court concluded that preventive detention "serves a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause in juvenile proceedings."¹⁴⁵

In contrast the Bail Reform Act is relatively unique. Although several American jurisdictions currently authorize preventive detention of adult defendants, that measure is rarely, if ever, used.¹⁴⁶ Moreover, only the District of Columbia Court of Appeals, in *Edwards*, has considered the constitutionality of incarcerating adult defendants prior to trial solely on the grounds that they pose a danger to the community.¹⁴⁷ There is, then, less than a uniform judgment in favor of preventive detention of adult defendants.

Finally, because of the relatively mild conditions of confinement under the New York act, the *Schall* Court found it easy to characterize preventive detention as regulatory, rather than punitive.¹⁴⁸ Those conditions, however, are dissimilar to the conditions of confinement that the Bail Reform Act prescribes.

The most fundamental difference between the statutes relates to time. Under the New York statute, the maximum possible period of detention was seventeen days.¹⁴⁹ The Bail Reform Act, however, authorizes indefinite pretrial detention.¹⁵⁰ As Chief Judge Feinberg remarked at oral argument in the *Melendez-Carrion* case, "You don't think there's a quantum leap from 17 days to two or three years?"¹⁵¹

The *Schall* Court also concluded that the physical conditions of detention under the New York scheme reflected a regulatory pur-

143. 467 U.S. at 266-68 & n.16. Several model acts also authorized preventive detention of juvenile offenders. *Id.* at 267 & n.17.

144. *Id.* at 267-68.

145. *Id.* at 268.

146. S. REP. NO. 225, 98th Cong., 1st Sess. 6, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3188. Several model acts have also endorsed preventive detention of adults. *Id.*

147. In *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981), cert. denied, 455 U.S. 1022 (1982), the District of Columbia Court of Appeals upheld a scheme for preventive detention that Congress had enacted for the District in 1970. See *supra* Section IV.B.

148. 467 U.S. at 269-71.

149. *Id.* at 270.

150. *United States v. Melendez-Carrion*, 790 F.2d 984, 999 (2d Cir. 1986); see *supra* notes 65-78 and accompanying text.

151. *Riley*, *supra* note 62, at 32, col. 2.

pose.¹⁵² Many children stayed at halfway houses, without locks or bars.¹⁵³ Even at "secure" facilities, children were placed in separate dormitories according to age, size, and behavior; they wore street clothes; and they could participate in educational and recreational activities, as well as counseling sessions.¹⁵⁴ Only under "exceptional circumstances" could the state incarcerate a juvenile defendant with adult offenders.¹⁵⁵

Under the Bail Reform Act, pretrial detainees must be separated from sentenced prisoners only "to the extent practicable."¹⁵⁶ As the Second Circuit observed, this standard "will inevitably permit confinement of pretrial detainees with sentenced prisoners in some circumstances."¹⁵⁷ Furthermore, some adult detainees "have been housed in secure facilities and confined to their cells for twenty-three hours a day."¹⁵⁸ Lastly, the conditions of adult pretrial confinement can be extremely harsh. Subject to only the most limited judicial scrutiny, the warden can, for example, authorize body cavity searches of detainees after each occasion on which they have physical contact with visitors.¹⁵⁹

D. *The Mental Impairment Cases*

Several courts have held that a compelling state interest, such as the prevention of crime, might outweigh the liberty interests even of competent adults.¹⁶⁰ Those courts, however, have relied on a line of Supreme Court cases that concern detention or civil commitment for insane, incompetent, or mentally retarded persons. Under these cases, the government may detain persons who are both dangerous and insane;¹⁶¹ on the other hand, the Constitution prohibits

152. 467 U.S. at 270.

153. *Id.* at 271.

154. *Id.*

155. *Id.* at 270.

156. 18 U.S.C. § 3142(i)(2) (Supp. III 1985).

157. *United States v. Melendez-Carrion*, 790 F.2d 984, 999 n.2 (2d Cir. 1986).

158. *Id.* at 999.

159. *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979). See *supra* Section IV.A.

160. See, e.g., *United States v. Zannino*, 798 F.2d 544, 548-49 (1st Cir. 1986); *United States v. Perry*, 788 F.2d 100, 112-13 (3d Cir.), *cert. denied*, 107 S. Ct. 218 (1986); *United States v. Hazzard*, 598 F. Supp. 1442, 1450 (N.D. Ill. 1984).

161. For example, in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940), the Supreme Court permitted civil commitment of "sexual psychopaths"—persons unable to control their sexual appetites. *Id.* at 275-77. In *Greenwood v. United States*, 350 U.S. 366 (1956), the Court upheld the constitutionality of a federal statute that authorized indefinite pretrial detention of criminal defendants who were both dangerous and mentally incompetent. *Id.* at 375; cf. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (state may not authorize indefinite pretrial detention of mentally incompetent defendants who

pretrial detention of criminal defendants who are not dangerous, but who are unable to stand trial because of mental incompetence.¹⁶²

Plainly, none of these cases addresses the validity of governmental restraints on the liberty of competent, adult citizens. To suggest, as one court has, that these cases provide at least "indirect support" for preventive detention of competent adults¹⁶³ is merely to concede that these cases are fundamentally distinguishable. Like the juvenile offenders in *Schall*, persons who have been adjudged¹⁶⁴ to constitute a threat to society *and* who are not in control of their rational faculties can claim only a diminished interest in personal freedom. The Court has sanctioned the incarceration of this class of persons precisely because they are unable to control their conduct.

Under the Bail Reform Act, however, mature citizens are incarcerated even though they are fully able to control their own conduct.¹⁶⁵ The *Korematsu* case¹⁶⁶ notwithstanding, the Supreme Court has yet to decide whether *any* governmental interest is sufficiently compelling to warrant incarceration of mentally competent adults prior to a finding of guilt.¹⁶⁷

are not dangerous). In *Addington v. Texas*, 441 U.S. 418 (1979), the Court held that the government may place persons in civil commitment only upon clear and convincing evidence that they are both dangerous and insane. *Id.* at 433. Finally, in *Jones v. United States*, 463 U.S. 354 (1983), the Court sanctioned indefinite post-trial detention of criminal defendants who have been found guilty by reason of insanity. *Id.* at 366.

162. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Unlike the federal statute at issue in *Greenwood*, the Indiana statute did not premise detention on a finding of the defendant's dangerousness. 406 U.S. at 736.

163. *United States v. Zannino*, 798 F.2d 544, 548-49 (1st Cir. 1986).

164. Each of the cases that allowed detention of dangerous, insane persons also stated that, prior to an extended period of detention, the government must afford a hearing that satisfies the demands of due process. See *Jones*, 463 U.S. at 363-66 (criminal trial); *Addington*, 441 U.S. at 426-32 (civil proceeding in which government must present clear and convincing evidence that person is both mentally ill and dangerous); *Greenwood*, 350 U.S. at 367-68 & n.1 (judicial determination of whether defendant is incompetent to stand trial); *Pearson*, 309 U.S. at 275 (hearing before probate judge at which two medical doctors were required to testify; defendant had the right to counsel and to call witnesses).

165. *Cf. Tribe*, *supra* note 6, at 293 ("We know you can control your behavior, for we are about to try you as a criminal, but we do not trust you to refrain from crime. How could the accused possibly respond?").

166. In *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court upheld the internment of thousands of Japanese-Americans who had neither been convicted nor even accused of any crime. See *United States v. Melendez-Carrion*, 790 F.2d 984, 1004 (2d Cir. 1986).

167. See *Bell v. Wolfish*, 441 U.S. 520, 534 n.15 (1979).

V. THE *SALERNO* CASEA. *The Second Circuit*

In *United States v. Salerno*¹⁶⁸ a divided panel of the United States Court of Appeals for the Second Circuit held that the Bail Reform Act deprived detainees of liberty without substantive due process of law.¹⁶⁹ This decision, which the Supreme Court has decided to review¹⁷⁰ and seems likely to reverse, relied in large part upon Judge Newman's opinion in a previous Second Circuit case, *United States v. Melendez-Carrion*.¹⁷¹ The viability of *Salerno*, and perhaps of any challenge to the Act's constitutionality, therefore depends upon the strength of Judge Newman's reasoning.

Judge Newman, who authored the opinion of the court, and Chief Judge Feinberg, who wrote a concurring opinion, agreed that the Act did not violate the eighth amendment;¹⁷² that Congress could have designed the Act as a valid regulatory measure;¹⁷³ and that eight months of pretrial detention, imposed solely on the grounds of dangerousness, would violate due process.¹⁷⁴ But they differed as to whether preventive detention could ever be constitutional.¹⁷⁵

Chief Judge Feinberg contended that, at its outset, preventive detention was a valid regulatory tool; with the passage of time, however, it might degenerate into punishment.¹⁷⁶ Judge Newman concluded that Congress could "not constitutionally authorize pretrial detention on grounds of dangerousness for any length of time as a regulatory measure."¹⁷⁷ His argument will strike a chord with those who fear the consolidation of governmental power and who admire the American form of government because of its respect for individ-

168. 794 F.2d 64 (2d Cir.), cert. granted, 107 S. Ct. 397 (1986).

169. *Id.* at 71-75.

170. See *supra* notes 30-32 and accompanying text.

171. 790 F.2d 984 (2d Cir. 1986); see *Salerno*, 794 F.2d at 71-75. For a description of the unique circumstances surrounding the *Melendez-Carrion* opinion, see *supra* notes 18-26 and accompanying text.

172. 790 F.2d at 997-99.

173. *Id.* at 999-1000. In this regard, the approach presented *supra* Section IV.A is analytically distinct from that which Newman has proposed; I have maintained that the Act is not a valid regulatory measure under any circumstances. See *supra* notes 102-110 and accompanying text.

174. See 790 F.2d at 1000.

175. *Id.* at 1000.

176. *Id.* at 1007-09 (Feinberg, C.J., concurring). Indeed, even among the courts that have upheld the Bail Reform Act, many have taken this view. See *supra* note 78 and authorities cited therein.

177. *Id.* at 1000.

ual liberty: detention imposed in order to protect society from predicted but unconsummated offenses is, or ought to be, contrary to a fundamental tenet of the American system of criminal justice.

Judge Newman first attacked the assertion based on *Schall*¹⁷⁸ that preventive detention of adults is a rational means of advancing the compelling governmental interest of public safety:

The fallacy of using such a test can readily be seen from consideration of preventive detention as applied to persons not arrested for any offense. It cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future. Yet such a police state approach would undoubtedly be a rational means of advancing the compelling state interest in public safety.¹⁷⁹

Newman then clearly established that his decision rested on the ground of substantive, rather than procedural, due process:

Even if a statute provided that a person could be incarcerated for dangerousness only after a jury was persuaded that his dangerousness had been established beyond a reasonable doubt at a trial surrounded with all of the procedural guarantees applicable to determinations of guilt, the statute could not be upheld, no matter how brief the period of detention.¹⁸⁰

Like Judge Weinstein in *United States v. Colombo*,¹⁸¹ Newman asserted

178. 467 U.S. 253 (1984). See *supra* Section IV.C.

179. 790 F.2d at 1000.

180. *Id.* at 1001.

181. 616 F. Supp. 780, 785 (E.D.N.Y.), *rev'd*, 777 F.2d 96 (2d Cir. 1985). Judge Weinstein, the trial court judge, ordered Colombo and his codefendants released from preventive detention. He conceded that Colombo, a notorious Mafia chieftain, remained dangerous. See 616 F. Supp. at 788. It appeared, however, that 13 months to two years were likely to pass before his trial could take place. *Id.* at 785. Judge Weinstein stated: "Such a long period of preventive detention without a finding of guilt, based solely on possible danger to the public, is 'anathema to American ideals of due process.'" *Id.* (quoting R.B. McNAMARA, CONSTITUTIONAL LIMITS ON CRIMINAL PROCEDURE 135 (1982)). The judge, one of the nation's foremost experts on the law of evidence, also offered an analogy based on FED. R. EVID. 404, which generally prohibits introduction of evidence of a defendant's bad acts in order to prove propensity for misconduct: "Our criminal law has generally set its face against the inference prior to conviction of bad man therefore bad act." 616 F. Supp. at 786.

Clearly seeking to avoid a constitutional confrontation, the Second Circuit reversed: a unanimous panel held that a determination of the probable length of detention was premature. 777 F.2d at 100-01. The appellate court did indicate, however, that the passage of time might render detention punitive and hence unconstitutional. *Id.* at 101.

that preventive detention ran counter to fundamental American justice:

The system of criminal justice contemplated by the Due Process Clause—indeed, by all of the criminal justice guarantees of the Bill of Rights—is a system of announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.¹⁸²

From the general principle that criminal conduct requires a coincidence of *mens rea* and *actus reus*, it follows that society cannot punish persons for evil thoughts alone.¹⁸³ Similarly, society cannot inflict further punishment on persons whose prison sentences have expired, even if these persons are likely to commit criminal acts in the future.¹⁸⁴ Judge Newman further contends that the mere fact of arrest—the determination that there is probable cause to believe a defendant has committed a criminal offense—does not justify an inquiry into the defendant's propensity for criminal conduct.¹⁸⁵

Newman correctly conceded that an arrest can justify some regulatory curtailment of liberty.¹⁸⁶ Still he reasoned that detention of competent adult defendants is regulatory only if it serves the integrity of the judicial process.¹⁸⁷ Detention imposed to ensure the defendant's presence at trial, or to protect witnesses and jurors, serves the integrity of the judicial process by guaranteeing that a criminal defendant will receive a fair trial.¹⁸⁸ On the other hand, detention designed to protect society from predicted but unconsummated of-

182. 790 F.2d at 1001.

183. See *id.* at 1000.

184. This proposition also seems to follow from the requirement of a coincidence of *mens rea* and *actus reus*. Thus, it is not important to decide whether, as a constitutional matter, this principle is embodied in the due process clause, *Melendez-Carrion*, 790 F.2d at 1001 (opinion of Newman, J.), or the double jeopardy clause, *United States v. Salerno*, 794 F.2d 64, 77 n.1 (2d Cir.) (Feinberg, C.J., dissenting), *cert. granted*, 107 S. Ct. 397 (1986).

185. 790 F.2d at 1001.

186. *Id.* at 1001-02; see *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975).

187. 790 F.2d at 1002.

188. *Id.*; see *supra* notes 40-43 and accompanying text.

fenses does not increase the likelihood of a fair trial. Accordingly, such detention is not simply regulatory.¹⁸⁹

The government argued that the earlier Supreme Court decision of *Gerstein v. Pugh*¹⁹⁰ endorsed prevention of future criminal conduct as a legitimate justification for detaining defendants after their arrest: "Once the suspect is in custody . . . [t]here no longer is any danger that the suspect will escape or commit further crimes" ¹⁹¹ The *Salerno* court held that these loose words do not validate preventive detention. *Gerstein* stands for the principle that states cannot detain defendants for an indefinite period of time prior to a neutral magistrate's determination of probable cause.¹⁹² It would be ironic, therefore, if *Gerstein* were to become the vehicle for the legitimization of preventive detention.¹⁹³

B. *The Supreme Court*

One might well ask whether it is the Second Circuit, rather than Congress, that has acted beyond its constitutional powers. After undertaking a thorough inquiry, Congress reasonably concluded that the Bail Reform Act was constitutional. That conclusion is sincere and resolutely held.¹⁹⁴ Moreover, in the congressional debates, few elected representatives seem to have expressed concern over the Act's constitutionality,¹⁹⁵ and only the possibility of lengthy pretrial detention sparked their concern.¹⁹⁶

In addition, the courts have concluded almost uniformly that, at least at its outset, preventive detention is constitutional.¹⁹⁷ Yet these decisions may rest more upon judicial deference than legal reasoning; given Congress' careful attention to the constitutional issues,¹⁹⁸ and the steady growth of precedent that seems at first glance to support the Act's constitutionality,¹⁹⁹ perhaps some of

189. 790 F.2d at 1002.

190. 420 U.S. 103 (1975).

191. *Id.* at 114.

192. *Id.*; *United States v. Salerno*, 794 F.2d 64, 74 (2d Cir.), *cert. granted*, 107 S. Ct. 397 (1986).

193. *Salerno*, 794 F.2d at 74.

194. See S. REP. NO. 225, 98th Cong., 1st Sess. 7-8, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3189-90.

195. See 130 CONG. REC. S938-47 (daily ed. Feb. 3, 1984).

196. *Id.* at S939-40 (daily ed. Feb. 3, 1984) (statements of Sen. Mitchell); *id.* at S944 (statements of Sen. Specter).

197. See *supra* note 78 and authorities cited therein.

198. See S. REP. NO. 225, 98th Cong., 1st Sess. 7-10, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3189-92.

199. See *supra* Section IV.

these courts have simply avoided a direct constitutional confrontation. In fact, a number of courts have expressly dodged the issue of the Act's constitutionality.²⁰⁰ Furthermore, the position of the four circuits that have upheld the Act—that detention, although initially regulatory, may at some unspecified point degenerate into punishment—plainly reflects their attempt to defer the ultimate decision.²⁰¹ Preventive detention appears to have troubled the courts more than it troubled Congress.

This should not come as a surprise. The courts, not Congress, must confront expanding dockets of complex criminal cases, the very type of cases that demonstrate the unwisdom of Congress' reliance on the time limitations of the Speedy Trial Act.²⁰²

More important, because of its relative insulation from political pressures, the federal judiciary has traditionally vindicated the rights of those victimized by "the occasional tyrannies of governing majorities."²⁰³ Few would rush to defend the Mafia overlord²⁰⁴ or the violent opponent of the American presence in Puerto Rico.²⁰⁵ It is essential to recall, however, that in many of the crucial decisions outlining the right to bail, the defendants were unpopular opponents of the government.²⁰⁶ If the courts should abandon Salerno

200. See, e.g., *United States v. Colombo*, 777 F.2d 96, 100-01 & n.2 (2d Cir. 1985); *United States v. Leon*, 766 F.2d 77, 78 (2d Cir. 1985); *United States v. Orta*, 760 F.2d 887, 889 n.8 (8th Cir. 1985); *United States v. Williams*, 753 F.2d 329, 333 (4th Cir. 1985). I do not mean to suggest that it is proper for a court to eschew a narrow, statutory ground for its decision in order to reach a constitutional question.

201. See *United States v. Zannino*, 798 F.2d 544, 546-48 (1st Cir. 1986); *United States v. Portes*, 786 F.2d 758, 768 & n.14 (7th Cir. 1985); *United States v. Accetturo*, 783 U.S. 383, 388 (3d Cir. 1986). In a two paragraph per curiam decision, the Eleventh Circuit summarily declared the Act constitutional. *United States v. Rodriguez*, 803 F.2d 1102, 1103 (11th Cir. 1986). This statement may well be dicta, since the court seemed already to have disposed of the defendant's claims strictly on statutory grounds. *Id.* Even if the statement is not dicta, from the court's citation to the Seventh Circuit's *Portes* decision one may infer some solicitude for the plight of defendants indefinitely detained. *Id.*

202. See generally *United States v. Colombo*, 616 F. Supp. 780, 787 (E.D.N.Y.), *rev'd*, 777 F.2d 96 (2d Cir. 1985) (detailing why, from the perspective of a federal trial court judge, Congress' reliance on the Speedy Trial Act was "unrealistic").

203. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

204. *United States v. Salerno*, 794 F.2d 64 (2d Cir.), *cert. granted*, 107 S. Ct. 397 (1986).

205. *United States v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986). "Because the defendants whose liberties are most affected are those who are unlikely to command public sympathy or attention, it is unlikely there will be action from Congress, which already has declined several opportunities to remedy the situation." *United States v. Accetturo*, 783 F.2d 383, 395-96 (3d Cir. 1986) (Sloviter, J., dissenting).

206. See, e.g., *Sellers v. United States*, 89 S. Ct. 36 (Black, Circuit Justice 1968); *Carlson v. Landon*, 342 U.S. 524 (1952); *Stack v. Boyle*, 342 U.S. 1 (1951); *Williamson v. United States*, 184 F.2d 280 (Jackson, Circuit Justice 1950).

or Melendez-Carrion, then, in the words of Justice Jackson, they "also cast aside protections for the liberties of more worthy" defendants—the protections of "critics who may be in opposition to the government of some future day."²⁰⁷

In American constitutional history, few issues have proved as divisive as that of substantive due process—the Court's reservation of the power to refer to natural law principles in order to invalidate popularly enacted legislation. As exercises in substantive due process, the *Salerno* and *Melendez-Carrion* decisions yield no limiting principle: the Second Circuit did not, and perhaps cannot, delineate the boundaries of its powers of review.²⁰⁸ This is a situation fraught with difficulties, both political and jurisprudential. Even greater difficulties would arise, though, were the judiciary to abdicate its power to define and to protect fundamental liberties.

The Supreme Court will hear the *Salerno* appeal this term. To affirm the judgment, the Court need not adopt the novel reasoning of Judge Newman.²⁰⁹ In *Bell v. Wolfish*²¹⁰ the Court itself announced a principle grounded in substantive due process: that the government may not inflict punishment prior to an adjudication of guilt.²¹¹ Under that principle, preventive detention does constitute punishment.²¹² Alternatively, the Court might hold that the bail clause prohibits Congress from establishing a regime of preventive detention,²¹³ or that the liberty interests of competent adults are so important that even the compelling governmental interest in public safety is insufficient to warrant the imposition of preventive detention.²¹⁴

At the very least, the Court has a responsibility to address the Act's toleration of indefinite periods of pretrial detention.²¹⁵ The Court should agree with the First, Third, and Seventh Circuits that even if detention is constitutional at its outset, at some point it will degenerate into punishment and become unconstitutional.²¹⁶ Un-

207. *Williamson*, 184 F.2d at 284.

208. Compare the positivist-incorporationist method of constitutional exegesis that Justice Black advocated. *Griswold v. Connecticut*, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting).

209. In fact, the Court need not issue a decision at all, since Salerno's conviction has rendered the case technically moot. See *supra* note 32.

210. 441 U.S. 520 (1979). See *supra* Section IV.A.

211. 441 U.S. at 535.

212. See *supra* Section IV.A.

213. See *supra* Section IV.B.

214. See *supra* Sections IV.B-C.

215. See *supra* notes 65-78 and accompanying text.

216. See *United States v. Zannino*, 798 F.2d 544, 546-48 (1st Cir. 1986); *United States*

fortunately, this issue will not be directly before the Justices: the *Salerno* defendants had been in detention for only three months when the Second Circuit ordered their release.²¹⁷ Nevertheless, it is incumbent upon the Court to reach this question, not only to provide guidance, but also to ensure that the federal judiciary continues to fulfill the role it has traditionally occupied—that of the guardian of human rights.²¹⁸

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v. *Portes*, 786 F.2d 758, 768 & n.14 (7th Cir. 1985); *United States v. Accetturo*, 783 F.2d 383, 388 (3d Cir. 1986); *see also* *United States v. Salerno*, 794 F.2d 64, 78 (2d Cir.) (Feinberg, C.J., dissenting), *cert. granted*, 107 S. Ct. 397 (1986); *United States v. Melendez-Carrion*, 790 F.2d 984, 1007-09 (2d Cir. 1986) (Feinberg, C.J., concurring) (asserting in concurrence and dissent that detention that is constitutional at its outset may become unconstitutional with the passage of time).

217. 794 F.2d at 79 (Feinberg, C.J., dissenting).

218. I do not mean to suggest that, as a matter of course, courts should decide unnecessary issues, constitutional or otherwise.